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November 17, 2021

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

In Re: Generic Docket to Study and Review Pre-filed Rebuttal and Surrebuttal Testimony in Hearings and Related Matters
Docket No. 2021-291-A

Dear Ms. Boyd:

On behalf of the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, North Carolina Sustainable Energy Association, Carolinas Clean Energy Business Association, and the Solar Energy Industries Association (collectively, "Nonprofit Intervenors"), we appreciate the opportunity to file these joint comments regarding pre-filed rebuttal and surrebuttal testimony. As regular participants in Commission proceedings, Nonprofit Intervenors believe that allowing pre-filed surrebuttal testimony as a matter of course—as has been past practice at the Commission—supports notions of fairness, efficiency, and the public interest. Our comments will first outline the legal standards applicable to surrebuttal testimony at the Commission, and then lay out three recommendations to the Commission, summarized below:

1. The Commission should continue to allow pre-filed surrebuttal testimony to ensure a full evidentiary record and reduce hearing time.

2. The Commission should allow surrebuttal testimony that is responsive to issues raised by other parties in the proceeding, and should review challenges on a case-by-case basis.

3. Procedural schedules should allow sufficient time for discovery between utility direct testimony and ORS/intervenors' direct testimony to ensure that parties' direct testimony filings are as full and complete as possible.

APPLICABLE LEGAL STANDARDS

1. Evidentiary Standards Applicable to Commission Proceedings

As an initial matter, the Commission is a quasi-judicial body and is thus allowed wide latitude in procedural matters and is not restricted to the strict rules of evidence adhered to in a judicial court.[1] In Richards v. City of Columbia, the Supreme Court noted that this principal applies to all administrative and quasi-judicial entities, even where an entity's enabling statute does not specifically exempt it from strict evidentiary rules.[2] With respect to evidentiary matters, this latitude means that administrative agencies like the Commission may admit evidence even when it may not be admissible otherwise.[3] The primary limitation on this latitude is that hearings must adhere to minimum standards of due process.[4]

The Commission's rules of procedure provide for this latitude as well. While hearings shall generally adhere to the rules of evidence as applied in the court of common pleas, the Commission's rules of procedure also specify that the intent of the rules is to

[1] Jacoby v. S.C. State Board of Naturopathic Examiners, 64 S.E.2d 138, 149 (S.C. 1951) ("An administrative or quasi judicial body is allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court"); see also Hallums v. Michelin Tire Corp., 419 S.E.2d 235, 239 (Ct. App. 1992).
[2] 88 S.E.2d 683, 689 (S.C. 1955) ("[E]ven without the aid of statute it is held that an administrative or quasi-judicial body is not governed by the ordinary legal rules of evidence").
[3] See, e.g., Calhoun v. Marlboro Cnty. Sch. Dist., 2004 WL 5334910 at *6 (S.C. Ct. App. 2004) (holding that a school board was entitled to admit hearsay evidence regarding parent and teacher complaints because school board hearings are quasi-judicial in nature).
[4] Smith v. S.C. Dep't of Mental Health, 494 S.E.2d 630, 638 (S.C. Ct. App. 1997).

promote efficiency in Commission proceedings.[5] And the Commission may waive its own regulations in circumstances where strict adherence would cause unusual hardship or difficulty and where doing so is not contrary to the public interest.[6]

Therefore, both case law and the Commission's regulations support the principle that the Commission has broad discretion in the application of evidentiary standards and may allow some deviation from these rules, such as where doing so would support the public interest, prevent hardship to parties, or promote efficiency in Commission proceedings.[7]

2. Admissibility and Scope of Reply Testimony

The admission of reply testimony in particular is within the sound discretion of the Commission and will only result in reversal if the admission of such testimony is found to be prejudicial.[8] Indeed, the Commission's discretion on these matters is particularly broad because:

> Unlike a jury, the Commission is considered a panel of experts. *Hamm v. South Carolina Public Service Com'n*, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992)…The Commission, like a court, can hear testimony and give that testimony whatever weight it deems appropriate, as well as determine if it is reasonable and prudent to hear such testimony in deciding as to whether it may be inadmissible.[9]

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[5] S.C. Code. Regs. §103-825; S.C. Code. Regs. §103-802 (stating that the Commission's rules are intended to promote efficiency in, and certainty of, the procedures and practices at the Commission).

[6] S.C. Code. Regs. §103-803 ("In any case where compliance with any of these rules and regulations produces unusual hardship or difficulty, or where circumstances indicate that a waiver of one or more rules or regulations is otherwise appropriate, such rule or regulation may be waived by the Commission upon a finding by the Commission that such waiver is not contrary to the public interest").

[7] Because we think surrebuttal is permissible under applicable evidentiary law, we are not suggesting that the Commission *needs* to deviate from strict evidentiary rules in the context of surrebuttal. However, we do think it is important when evaluating Commission procedure for the Commission to understand that it has broad discretion to conduct hearings in a manner that serves efficiency and the public interest.

[8] State v. Farrow, 504 S.E.2d 131, 133 (S.C. Ct. App. 1998).

[9] S.C. Pub. Serv. Comm'n Docket No. 2020-63-E, In Re: Petition of Bridgestone Americas Tire Org., LLC for an Ord. Compelling Dominion Energy S.C., Inc. to Allow the Operation of A 1980 Kw Ac Solar Array As Authorized by State L., Order No. 2020-535 at 14-15 (Aug. 14, 2020).

For this reason, in order to create a complete record, motions to strike are disfavored in administrative proceedings.[10]

With respect to appropriate scope of reply testimony, there is no applicable South Carolina Rule of Evidence; rather, the evidentiary standards related to reply testimony have been developed through case law, largely in the context of traditional trial court proceedings. Under those standards, "any arguably contradictory testimony is proper on reply,"[11] so long as the reply testimony does not inject new issues into the case that the party should have raised in its case in chief.[12] Even evidence that does not meet these standards may be admitted at the discretion of the court, unless doing so would result in prejudice.[13]

These limitations on the scope of reply testimony stem from due process and are intended to prevent "sandbagging" at trials—concerns which are clearly minimized substantially in Commission proceedings, where reply testimony (both rebuttal and surrebuttal) is pre-filed. For instance, in one case, the Supreme Court found that a trial court had abused its discretion in admitting testimony when,

> literally in the midst of the arguments to the jury, one side was permitted to interrupt the usual proceedings to produce a witness, who, in effect, attacked the veracity of a very important witness for the other, and then the door was abruptly closed in the face of further evidence.[14]

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[10] See In re ConocoPhillips Transp. Alaska, Inc., et al., 2011 WL 6318621 (Reg. Comm'n. of Alaska 2011) (cited in S.C. Pub. Serv. Comm'n Order No. 2014-5-H).
[11] State v. South, 331 S.E.2d 775, 779 (S.C. 1985).
[12] State v. Farrow, 504 S.E.2d 131,133 (S.C. Ct. App. 1998); *see also* S.C. Pub. Serv. Comm'n, Docket No. 2020-1-E, In Re: Ann. Rev. of Base Rates for Fuel Costs of Duke Energy Progress, LLC, Order No. 2020-439 (June 30, 2020) (South Carolina law "limits reply testimony, which includes surrebuttal testimony, to that which responds to matters already raised").
[13] Daniel v. Tower Trucking Co., 32 S.E. 2d 5, 10 (S.C. 1944) ("He upon whom lies the burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of true reply and not such as should have been offered in the case in chief. The latter may also be allowed, but only in the discretion of the Court.").
[14] Id.

In other words, "where the introduction of additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side."[15]

The standards outlined above make clear that the Commission has the discretion to allow pre-filed surrebuttal testimony as a matter of course, and that such testimony may properly be admitted unless doing so would cause undue prejudice to other parties. The Commission also has broad discretion over the proper scope of such testimony. As explained further below, however, we believe that the Commission not only *may* allow such testimony, but *should* in order to serve the public interest and promote judicial efficiency.

RECOMMENDATIONS TO THE COMMISSION

1. The Commission should continue to allow pre-filed surrebuttal testimony to ensure a full record and to reduce hearing time.

Nonprofit Intervenors strongly recommend that the Commission continue to allow pre-filed surrebuttal testimony as a matter of course, rather than requiring intervenors or ORS to ask for leave to file such testimony. The Commission has the broad and difficult task of regulating the state's utilities in the public interest. This involves complicated questions such as whether rates are "just and reasonable," when a utility expenditure is "prudent," and whether a utility's Integrated Resource Plan appropriately balances seven broad and often competing factors. As such, it is natural that experts from utilities, intervenors, and ORS are going to disagree on some issues, agree on others, with various degrees of separation in between. Knowing those positions from all parties ensures a fuller

[15] Id.

record and allows the Commission to weigh those various opinions and make an informed decision.

In this regulatory context, intervenors and ORS often do not merely critique a utility's proposal, but may also offer recommendations or alternatives that they believe better meet statutory standards or goals, and present evidence in support of that alternative in direct testimony. If surrebuttal testimony is not allowed, the utility will have the opportunity to respond to critiques of its own proposals, but ORS and intervenors would not be afforded the same opportunity.

Accordingly, we recommend that the Commission allow surrebuttal testimony to be (1) pre-filed, rather than elicited for the first time at a hearing; and (2) permitted as a matter of course, rather than only permitted by leave of the Commission. Particularly due to the complex issues raised in Commission proceedings, eliciting surrebuttal testimony in its entirety on the stand could significantly increase hearing times. Pre-filed testimony also minimizes the risk of undue surprise to other parties. Further, allowing such testimony as a matter of course reduces the need for extensive motion practice before the Commission and ensures that procedural schedules allow adequate time for such testimony where it is required. We have attached to these comments a letter from Peter Ledford with the North Carolina Sustainable Energy Association reflecting his experience that hearing length can be increased in jurisdictions without surrebuttal testimony.[16]

2. Surrebuttal testimony should be responsive to issues raised by other parties in the proceeding, either the utility or ORS/Intervenor direct testimony.

We next recommend that the Commission reject any limitations on surrebuttal testimony that would prevent non-utility parties from responding to each other's direct

[16] **Attachment A**, Letter from Peter Ledford at N.C. Sustainable Energy Association.

testimony in surrebuttal. First, for the reasons discussed above, it is in the public interest for the Commission to be made aware of each party's position with respect to other parties. Second, allowing this testimony would not result in prejudice and would not deprive any party of a meaningful response; non-utility parties would be able to submit pre-filed testimony regarding others' direct testimony and conduct cross-examination of other parties' expert witnesses at a hearing as needed. Permitting intervenors and ORS to respond to each other would not require expanding the scope of surrebuttal testimony beyond that which is responsive to previously filed testimony. Finally, as noted in a recent proceeding, it would be unduly burdensome to parties and the Commission if non-utility parties were subject to three separate filing deadlines (direct, rebuttal, and surrebuttal) in any given proceeding.[17] It is far more efficient for non-utility parties to respond to each other's direct testimony in one responsive filing. Indeed, a simple change to the language in procedural schedules could accomplish this and provide more clarity to parties. Rather than stating a deadline for "ORS/Intervenor Surrebuttal Testimony," procedural schedules could instead provide for "ORS/Intervenor Responsive Testimony."

We continue to support limiting the scope of surrebuttal testimony to that which is responsive to previously filed testimony; this limitation ensures there is not undue surprise to other parties and promotes efficiency in Commission proceedings. However, we urge the Commission to exercise latitude in determining what testimony is "responsive." For example, we believe it is in the public interest for the Commission to allow parties to file surrebuttal testimony in *support* of propositions raised by other parties. As stated above, allowing such testimony ensures the Commission has access to a full evidentiary record

[17] See S.C. Pub. Serv. Comm'n Docket Nos. 2021-143-E and 2021-144-E, SACE et al. Response to ORS Motion to Strike a Portion of Surrebuttal Testimony,

that makes clear the positions and underlying rationales for each party, so that the Commission can weigh that evidence and make an informed decision.

We also urge the Commission to exercise caution in determining the *scope* of issues that are responsive to other testimony. Given the complex nature of utility proceedings, an expert may not be able to fully respond to another party's critique without also addressing certain ancillary or related issues. As such, we recommend that the Commission review any challenged testimony on a case-by-case basis rather than issuing any bright-line rule, and to err on the side of denying motions to strike in order to ensure a full record.[18]

3. To ensure that parties' direct testimony filings are as full and complete as possible, the Commission should ensure that procedural schedules allow time for discovery between utility direct testimony and ORS/intervenors' direct testimony.

We recognize the Commission's concerns regarding the scope of information included in parties' direct testimony. To ensure that parties' direct testimony filings are as full and complete as possible, we recommend that the Commission ensure that procedural schedules allow parties adequate time for discovery on a utility's application and testimony.

Critical information regarding a utility's application or proposal often is not disclosed until the utility files direct testimony. While utilities have twenty days to respond to discovery requests, it has often been the case that there is not time for intervenors to file discovery on utility direct testimony and receive responses before their own direct testimony filing deadline. We therefore recommend intervenor direct testimony be due no sooner than thirty days after utility direct testimony so that intervenors are able to incorporate information from those responses into direct testimony. Allowing more time

[18] See supra, note 9.

on the front end for parties to prepare direct testimony may help ensure focused and targeted responsive testimony from all parties.

We further recommend that where utility applications are required, the Commission require those applications to fully lay out all relevant details and the underlying support for the utility's proposal; this could be accomplished by requiring utilities to contemporaneously file direct testimony along with their application, provided that the procedural schedule thereafter allows sufficient time for parties to thoroughly review those materials (which can often be voluminous), conduct discovery, and prepare direct testimony. Such a requirement would support transparency in Commission proceedings and improve the efficiency of the discovery process.

Respectfully submitted,

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Attachment A

NC SUSTAINABLE ENERGY ASSOCIATION

November 17, 2021

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Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Docket No. 2021-291-A
Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters

Dear Ms. Boyd,

I serve as General Counsel and Director of Policy for the North Carolina Sustainable Energy Association ("NCSEA"). In this role, I have represented NCSEA in numerous proceedings before the North Carolina Utilities Commission ("NCUC") and in several proceedings, appearing *pro hac vice*, before the South Carolina Public Service Commission ("Commission").

While the Commission routinely allows surrebuttal testimony, the NCUC rarely allows surrebuttal testimony. Throughout my practice in a state that *does not* usually have surrebuttal testimony, I have observed that the lack of surrebuttal testimony increases the length of hearings. Without the opportunity for surrebuttal testimony, attorneys and witnesses effectively add surrebuttal testimony into the record through questions asked in response to cross-examination and commissioner questions. In contrast, I have observed that attorneys and witnesses are able to avoid unnecessarily lengthy oral presentations by submitting pre-filed surrebuttal testimony in proceedings before the Commission.

Further, permitting surrebuttal testimony improves the fairness of regulatory proceedings. Most NCUC proceedings are initiated by an application of some sort, typically filed by a utility. Intervenors file direct testimony and the utility and intervenors then have the opportunity to file rebuttal testimony. However, the lack of surrebuttal testimony means that the utility has an opportunity to respond to the critiques of intervenors, but intervenors do not have the same opportunity. This gives the utility an opportunity to defend its positions through written testimony in a manner that is not available to intervenors.

I respectfully ask that the Commission continue its practice of allowing surrebuttal testimony, and I hope that my comparison between Commission and NCUC practices is informative as the Commission makes its determination.

Respectfully yours,

/s/ Peter H. Ledford

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2021-291-A

In Re: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal Testimony in Hearings and Related Matters	))))))	**CERTIFICATE OF SERVICE**

I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the joint comments filed on behalf of the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Sierra Club, Natural Resources Defense Council, Vote Solar, North Carolina Sustainable Energy Association, Carolinas Clean Energy Business Association, and the Solar Energy Industries Association.

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This 17th day of November, 2021.

s/*Kate Lee Mixson*